NO. 84-1279

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 8, 1985

QUESTION PRESENTED

Is the Supreme Court of Delaware required under the Confrontation Clause to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness?

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CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Confrontation Clause of the Sixth Amendment to the United States Constitution, this case also involves Delaware Constitution of 1897, Article I, §7, which states:

> In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty, or property, unless by judgment of his peers or by the law of the land.

STATEMENT OF THE CASE

This is a first degree murder prosecution based upon circumstantial evidence.[1] Van Arsdall v. State, 486 A.2d 1, 5 (Del. 1984) The location of this homicide was a three story apartment building in Smyrna, Delaware. Tr. II-117 (Whittaker).[2] On December 31, 1981, the front second floor apartment in the building was rented by Robert Fleetwood and the rear second floor apartment was occupied by Daniel Pregent, although that unit was rented to another individual. Tr. II-118 (Whittaker). There is a second floor hallway separating the Fleetwood and Pregent apartments. Tr. II-125 (Whittaker). Entrance from Commerce Street to the Fleetwood apartment is by means of a front door and the second floor hallway. Tr. II-120 (Whittaker) Entrance to the Pregent apartment can be made from either the front door on Commerce Street and the second floor hallway, or by means of an outside stairway located behind the apartment building. Tr. II-121-122 (Whittaker).

During his second visit to the Pregent apartment on December 31, 1981, Daniel Pregent showed Robert E. Van Arsdall the back door to his apartment and stated that Van Arsdall could visit him later by entering at the back of the building. Tr. X-41-42 (Van Arsdall). At approximately 11:30 p.m. on December 31, 1981, Van Arsdall returned to the Pregent apartment by the rear stairway. Tr. X-41 (Van Arsdall). After knocking on the back door of the Pregent apartment, Van Arsdall was invited in by Pregent. Tr. X-42-43 (Van Arsdall).

Prosecution witness Robert Fleetwood testified at trial that he left his apartment "around 11:00" and walked across the hall to Pregent's apartment. Tr. III-49 (Fleetwood). The door of the Pregent apartment was open, and Fleetwood claimed that he observed Van Arsdall sitting on the bed and Pregent's feet hanging from the bed. Tr. III-50 (Fleetwood). Fleetwood did not know if Doris Epps, the

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1 The State of Delaware in its February 7, 1985 Petition for Writ of Certiorari to the Delaware Supreme Court omits several crucial facts contained in the trial record of this 1982 proceeding in the Superior Court of the State of Delaware in and for Kent County. Several of these facts are discussed in this Statement of the Case. In addition, the Petitioner, State of Delaware, also attempts to simplify the complex factual nature of the evidence produced during this three week murder trial in an effort to demonstrate that certiorari review by this Court is appropriate and that the denial of defense counsel's right to cross-examine an important prosecution witness on the issue of interest or bias was merely harmless error under the facts of this case.

2 As in the State of Delaware's Petition for Writ of Certiorari, citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name.

victim, was present in the Pregent apartment at this time, but he did recollect that the lights were on in both the kitchen and living room/bedroom. Tr. III-50, 52 (Fleetwood).

Van Arsdall never acknowledged observing or being observed by prosecution witness Fleetwood prior to the Epps homicide.

During his cross-examination at trial, Van Arsdall stated that the last time he had seen Fleetwood prior to the homicide was during his second visit to the Pregent apartment and before his return at 11:30 p.m. Tr. X-78 (Van Arsdall). This defense assertion was contradicted by Fleetwood, who claimed to have seen Van Arsdall in the Pregent apartment at approximately 11:00 p.m. Tr. III-49-50 (Fleetwood). The importance of this contradiction between the testimony of Fleetwood and Van Arsdall was highlighted at trial by the prosecutor's provocative question to Van Arsdall during cross-examination as to why he went over to the Fleetwood apartment after the homicide: "Are you sure you didn't go across the hall to kill him?"[3] Tr. X-78 (Van Arsdall).

Robert S. Crain, a prosecution witness, testified that the victim, Doris Epps, passed out at the New Year's Eve party, and that he and Pregent placed Epps on Pregent's sofa bed in the living room. Tr. II-111 (Crain). During the course of the New Year's Eve party, Crain witnessed an argument between Pregent and Ida Mae Stevens, another Pregent party guest, which he described as follows: "Well,

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3 This cross-examination by the prosecutor also suggests that even if Van Arsdall claims he did not see Fleetwood when the latter said he visited the Pregent apartment at "around 11:00," such an inference cannot be drawn by the jury because if Van Arsdall crossed the hall after the Epps homicide, it was for the purpose of eliminating a witness to his presence at the scene immediately prior to the murder.

he wanted to fight, I believe he wanted to hit Ida Mae or something like that, and we had to sort of like hold him down and calm him down. He kicked a hole in the wall and everything." Tr. II-95 (Crain). When Crain and his brother Michael left Pregent's apartment between 11:00 and 11:15 p.m., Pregent and the now unconscious Doris Epps were lying on the bed. Tr. II-96 (Crain). When Crain left, he thought there was a light and radio on in the living room. Tr. II-113 (Crain). At that time, only Pregent and Epps were present, and Doris Epps was alive. Tr. II-113-114 (Crain).

Alice Jane Meinier, another prosecution witness,[4] also recalled the incident when Pregent had to be restrained from fighting with Ida Mae Stevens and she witnessed Pregent kick a hole in the hallway wall while being so restrained.[5] Tr. IV-54 (Meinier). Her recollection was that this incident involving Pregent occurred sometime after 6:30 p.m. Tr. IV-11, 55 (Meinier). Later that evening, both Fleetwood and Meinier left the Fleetwood apartment when Fleetwood went to get beer and Meinier walked over to Pregent's apartment to use the bathroom. Tr. IV-55 (Meinier).

When Fleetwood and Meinier left Fleetwood's apartment, Pregent became involved "in some sort of a scuffle" in Fleetwood's apartment, and glasses, ashtrays, and a table were broken." Tr. IV-55-56 (Meinier). When Fleetwood returncd from his evening visit to the liquor store, he found that Robert Crain and another individual had messed up his apartment during an argument. Tr. III-47-48 (Fleetwood). Fleetwood made everyone except Meinier and Mark Mood leave his apartment. Tr. III-48 (Fleetwood).

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4 The only defense trial witness was the defendant himself, Robert E. Van Arsdall.

5 She described Pregent as being "wild" during the altercation with Ida Mae Stevens. Tr. IV-54 (Meinier).

Although Fleetwood claims that he left his apartment again around 11:00 p.m. to go across the hall to Pregent's [Tr. III-49 (Fleetwood)], Meinier testified that Fleetwood did not leave his apartment after returning from the liquor store. Tr. IV-59 (Meinier). Meinier claims that she returned to Pregent's apartment later that evening to find out the time. Tr. IV-14 (Meinier). On that occasion she observed a clock on Pregent's kitchen floor,[6] and the time was 11:53 p.m. Tr. IV-14 (Meinier). There was a light on in both the kitchen and bathroom of the Pregent apartment, but Meinier claimed that the bedroom/living room area was dark at 11:53 p.m. Tr. IV-14 (Meinier).

Judith G. Tobin, M.D., the assistant state medical examiner, performed an autopsy on the body of Doris Epps at approximately 12:30 p.m. on January 1, 1982. Tr. II-52, 56 (Tobin). Dr. Tobin estimated the time of death to be between 12:00 midnight and 1:00 a.m. on January 1, 1982. Tr. II-65-66 (Tobin).

Van Arsdall attempted to sleep on the sofa cushions on the floor of Pregent's living room. Tr. X-49-50 (Van Arsdall). Van Arsdall was awakened when something was being drug by his feet. Tr. X-50 (Van Arsdall).

Van Arsdall sat up to observe what was happening, and he saw Pregent dragging Epps by her wrists. Tr. X-50 (Van Arsdall). From the kitchen light, Van Arsdall observed that Epps' body was limp. Tr. X-51 (Van Arsdall). He went to the doorway of the kitchen and observed Pregent squatting over Epps' body. Tr. X-52 (Van Arsdall). Epps was lying on her back on the kitchen floor, and Pregent was stabbing her

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6 The victim's body was found on Pregent's kitchen floor. Tr. IV-22 (Meinier). See Van Arsdall v. State, 486 A.2d 1, 5 (Del. 1984).

with a butcher knife.[7] Tr. X-52 (Van Arsdall). There was blood all over the Pregent kitchen, and a knife was sticking in the body. Tr. X-54-55 (Van Arsdall). Van Arsdall was knocked down in a scuffle with Pregent and almost fell on Epps' body. Tr. X-53-54 (Van Arsdall).

Thereafter, Pregent returned to his bed, and Van Arsdall walked across the second floor hallway and knocked on Fleetwood's apartment door. Tr. X-57 (Van Arsdall). Although there was no electricity in the Fleetwood apartment, Meinier estimated that approximately an hour or an hour and fifteen minutes after she had visited the Pregent apartment to check the time, she heard a knock on the outer apartment door. Tr. IV-17 (Meinier). When she opened Fleetwood's door, she saw a very tall man wearing a light blue shirt splattered with blood who carried a jacket. Tr. VI-17 (Meinier). From the appearance of his shirt, Meinier thought he "had a nose bleed" since the shirt " . . . wasn't full blooded, just splattered." Tr. IV-18 (Meinier).

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7 At trial on September 27, 1982, the State offered as State's Exhibit No. 75 a transcript of a January 1, 1982, tape recorded statement of Daniel Pregent, and as State's Exhibit No. 72, a tape recorded statement of Daniel Pregent of January 5, 1982. Tr. X-9, 13. In neither his January 1, 1982 tape recorded statement, nor the written transcript of the January 5, 1982 statement, did Daniel Pregent implicate his co-defendant Robert Van Arsdall in the Epps' homicide. Pregent denied committing the murder and in his two statements to the Smyrna Police Department speculated that Epps may have been killed in his apartment by a jealous boyfriend. As noted by the State of Delaware at footnote 13 on page 8 of its Petition for Writ of Certiorari, Pregent was acquitted of any criminal wrongdoing at a subsequent and separate trial. On September 30, 1982, the jury in Van Arsdall's first degree murder prosecution received a charge from the trial judge on accomplice liability. Tr. XII-15-16. Likewise, the prosecutor argued in his closing address to the jury on September 29, 1982, that Van Arsdall could also be convicted as an accomplice if Pregent committed all of the elements of first degree murder and possession of a deadly weapon during commission of a felony. Tr. XI-7. Defense counsel took exception to the trial court's giving any accomplice jury charge. Tr. XII-22-23.

Meinier recalled at trial that when Van Arsdall entered the Fleetwood apartment, he had bloody hands. Tr. IV-19 (Meinier). Van Arsdall also had a long serrated knife in his right hand, and Meinier recollected stating, "'That's a lethal weapon, Bobby. You better get rid of that because it's not safe . . . .'" Tr. IV-20 (Meinier). At that point, another occupant of the Fleetwood apartment, Mark Mood, stood up and took the knife from Van Arsdall. Tr. VI-20 (Meinier). Mood put the knife in the Fleetwood kitchen sink, and Meinier told Van Arsdall to wash his hands. Tr. IV-21 (Meinier).

Van Arsdall went into Fleetwood's bathroom to wash his hands as Meinier commanded, but when there was no water pressure, Meinier told him to wash in the kitchen sink. Tr. IV-21 (Meinier). While Van Arsdall was washing, Meinier testified that he told her, "' . . .there's something wrong across the hall . . . . '" Tr. IV-22 (Meinier). Meinier went to the Pregent apartment. Tr. IV-22 (Meinier). She opened the door slightly, the same lights were on as when she visited to check the time, and she could see someone lying in the kitchen with "a lot of blood all around." Tr. IV-22 (Meinier). After observing Epps' body, Meinier stated that she " . . . got a little hysterical I guess, and Bobby Van Arsdall held on to me and he said, 'It's all right' and I said, 'Well, the person might still be in there.'" Tr. IV-23 (Meinier).

Mark Mood then went all the way into the Pregent apartment, returned, and left the building. Tr. IV-24 (Meinier). Meinier estimated that it was approximately three or four minutes between when she first saw Epps' body in Pregent's apartment and Bruce Timmons of the Smyrna Police Department arrived at the outside door of the building. Tr. IV-24-25 (Meinier).

According to Van Arsdall, he and Meinier returned to Fleetwood's apartment and attempted to awaken Fleetwood. Tr. X-61-62 (Van Arsdall). When Van Arsdall and Meinier were back in the Fleetwood apartment, Officer Timmons went by the door. Tr. X-62 (Van Arsdall). While Van Arsdall and Meinier were standing by the sink in Fleetwood's apartment, Meinier told him to "Hide the knife, I think Bobby did it."[8] Tr. X-63 (Van Arsdall).

Bruce Timmons was the first policeman to enter Pregent's apartment. Tr. V-7 (Timmons). He checked Epps' vital signs, but she was dead. Tr. V-8 (Timmons). There was a great deal of blood on the floor. Tr. V-8 (Timmons). The bedroom area of the Pregent apartment was unlit, but with a flashlight, Timmons noticed a subject lying on the sofa bed wrapped in a blanket. Tr. IV-129 (Timmons). There was a large stain of what appeared to be blood next to the bed and on the bed. Tr. IV-130 (Timmons).

When Timmons went over to the bed and pulled away the covers, the individual on the bed " . . . started to come up. He was then pushed back down on the bed and handcuffed. . . ." Tr. IV-130 (Timmons). As Timmons took Pregent to the hallway, he noticed Corporal Howard Fortner of the Smyrna Police Department with Van Arsdall and Meinier. Tr. IV-133 (Timmons). While in the hallway, Timmons observed that Van Arsdall had what appeared to be blood stains on his clothing. Tr. IV-133 (Timmons). Timmons advised Fortner that Van Arsdall had blood on his clothing and told him to take Van Arsdall into custody as well. Tr. IV-134 (Timmons). Van Arsdall was handcuffed and

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8 Meinier's reference to "Bobby" was to Robert Fleetwood, not to the Defendant, Robert Van Arsdall. Tr. X-63 (Van Arsdall).

Fortner read his Miranda warnings. Tr. IV-134 (Timmons).

The Constitutional error which was the basis for the reversal of Van Arsdall's conviction by the Delaware Supreme Court in its November 19, 1984 Opinion[9] occurred on September 15, 1982, during the cross-examination of prosecution witness Robert Fleetwood on the third day of trial. Tr. III-69-88. After Fleetwood's direct testimony placing Van Arsdall in the Pregent apartment immediately prior to the Epps homicide [Tr. III-49-53 (Fleetwood)], defense counsel attempted to cross-examine Fleetwood concerning his possible bias or interest in testifing on behalf of the State. Tr. III-69-88 (Fleetwood).

When defense counsel attempted to cross-examine Fleetwood regarding his August 6, 1982 arrest on a charge of being drunk on the highway, the prosccutor at trial objected to the question. Tr. III-69 (Fleetwood). After a lenghty voir dire examination of witness Fleetwood outside the presence of the jury and the presentation of argument from legal counsel, the trial judge sustained the State's objection " . . . on the entire line of questioning." Tr. III-88.

At trial defense counsel was attempting to show that prosecution witness Fleetwood might have a possible bias or interest in testifying favorably to the State. Tr. III-69-88 (Fleetwood). Fleetwood was arrested on or about August 6, 1982, for the criminal offense of being drunk on the highway. Tr. III-71. When Fleetwood appeared in the Kent

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9 Now reported as Van Arsdall v. State, 486 A.2d 1 (Del. 1984).

County Court of Common Pleas on August 31, 1982,[10] Fleetwood and his attorney were able to strike a deal with the Delaware Attorney General whereby the criminal charge against Fleetwood would be dropped in exchange for his appearing the next morning at the Attorney General's office to discuss his upcoming testimony in the Van Arsdall prosecution. Tr. III-73 (Fleetwood).

The notice of nolle prosequi stated that the charge was dropped for "insufficient evidence" and was signed by D. C. Reed on August 31, 1982.[11] Tr. III-74. During the voir dire examination of prosecution witness Fleetwood outside the presence of the jury, Fleetwood responded to the prosecutor's question as to his understanding of why the criminal charge against him was dropped, as follows: "Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped."[12] Tr. III-76 (Fleetwood).

During oral argument to the trial judge, defense counsel stated that this issue of bias or interest cross-examination was controlled by the 1979 decision of the Delaware Supreme Court known as Wintjen v. State, 398 A.2d

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10 Robert Fleetwood was called as a prosecution witness in the Van Arsdall first degree murder prosecution on September 15, 15, 1982, approximately two weeks after his appearance in the Kent County Court of Common Pleas. Tr. III-40-90 (Fleetwood).

11 Prosecutor D. C. Reed was also the prosecuting attorney in the Kent County Superior Court homicide prosecution of Van Arsdall.

12 As indicated at footnote 16 at the bottom of page 9 of the State of Delaware's Petition for Writ of Certiorari, the Petitioner is not contesting the decision of the Delaware Supreme Court that the Kent County Superior Court committed error when it prevented Van Arsdall from questioning Fleetwood concerning the dismissal of his pending criminal charges.

780 (Del. 1979).[13] Tr. III-80. As a result of the trial judge's exclusion of the relevant bias cross-examination of prosecution witness Robert J. Fleetwood, defense counsel was prevented from showing the jury the factual basis for any potential bias or interest Fleetwood might have for testifying as he did against Van Arsdall. The importance of Fleetwood's testimony and why he was a significant prosecution witness in this case was his placing Van Arsdall at the Pregent apartment shortly before the Epps homicide [Tr. III-49-53 (Fleetwood)], and the use made by the prosecutor of Fleetwood's testimony[14] in cross-examining defendant Van Arsdall at trial. Tr. X-78 (Van Arsdall). During his cross-examination of Van Arsdall, the prosecutor asked the defendant if he went across the hall to Fleetwood's apartment after the Epps' homicide to kill Fleetwood. Tr. X-78 (Van Arsdall).

During closing argument, defense counsel pointed out to the jury that the prosecution presented sixteen witnesses and introduced seventy-five separate exhibits during nine days of testimony in an attempt to establish its circumstantial evidence case against Robert Van Arsdall.[15] Tr. XI-101-102. Defense counsel also noted in closing that there were no eyewitnesses to Van Arsdall committing any homicide and that the statement of Pregent was that he did

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13 Wintjen v. State, 398 A.2d 780 (Del. 1979) reversed various criminal convictions on the basis of a denial of bias cross-examination of a prosecution witness. The same Superior Court trial judge who presided in the Wintjen case also presided over this 1982 homicide prosecution of Robert Van Arsdall.

14 It must also be recalled that prosecution witness Alice Meinier denied that Fleetwood left his apartment after returning from the liquor store earlier that evening. Tr. IV-59 (Meinier).

15 Jury deliberations also extended over two days. See Van Arsdall v. State, supra, 5, for discussion of the circumstantial nature of the State's case.

not think Van Arsdall was involved. Tr. XI-109. A major assertion of the defense in closing argument was that if Van Arsdall had entered the Pregent apartment from the rear stairs unobserved by anyone except Pregent, why would Van Arsdall as a murderer or murder accomplice reveal himself to others by going across the hall with the bloody murder weapon and knocking on Fleetwood's apartment door. Tr. XI-96, 109.

Van Arsdall did not observe Fleetwood upon his return to the Pregent apartment, and Meinier denied that Fleetwood left his apartment at the time when Van Arsdall would have been present at Pregent's; thus, under these circumstances the highly provocative suggestion made by the prosecutor during his cross-examination of Van Arsdall[16] undercut Van Arsdall's entire defense. The homicide did not occur in Van Arsdall's residence, and the only other individual apart from Pregent (who did not suspect Van Arsdall of the homicide), who could place Van Arsdall at the scene immediately prior to the homicide was prosecution witness Robert Fleetwood.

SUMMARY OF ARGUMENT

I. The Delaware Supreme Court's utilization of a per se error rule governing total in limine prohibition of bias

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16 The prosecutor asked Van Arsdall on cross-examination if he went across the hall to kill Robert Fleetwood. Tr. X-78 (Van Arsdall).

cross-examination of a prosecution witness offering relevant testimony is consistent with the prior decisions of this Court. The Delaware Supreme Court clearly recognized that a harmless error analysis is appropriate in determining Constitutional Confrontation Clause violations when some cross-examination on the issue of bias or interest has been permitted. The Delaware Supreme Court has previously recognized that a harmless error standard may be employed when some cross-examination of a witness' bias or interest has been permitted. See Wintjen v. State, supra, 782; and Weber v. State, 457 A.2d 674, 682-83 (Del. 1983).

II. The Writ of Certiorari must be denied in this case because even under a harmless error analysis the error committed by the trial court was prejudicial and not harmless beyond a reasonable doubt. Robert Fleetwood was the only prosecution witness who placed Robert Van Arsdall at the homicide scene immediately prior to the crime. The prosecutor's poignant cross-examination of the accused at trial, suggesting that Van Arsdall only went across the hall to Fleetwood's apartment in order to kill Fleetwood and do away with a witness to his crime clearly establishes the important nature of Fleetwood's trial testimony. Even if it was improper to apply a per se error rule to a total in limine prohibition of bias cross-examination of a prosecution witness, no purpose will be served by reversing the decision of the Delaware Supreme Court and remanding this case for a determination if the error was harmless. Clearly, even under a Constitutional harmless error analysis, the error committed by the trial court was not harmless beyond a reasonable doubt. The facts of this case indicate that any reversal on a certiorari proceeding would

not result in a different decision from the Delaware Supreme Court regardless of whether a harmless or per se error rule is applied.

III. There is no need to hold this Petition during the pendency of U.S. v. Bagley, ___ U.S. ___, 105 S. Ct. 427 (1984). Bagley deals with an alleged Brady violation. It is factually distinguishable from the Van Arsdall jury verdict which was reversed by the Delaware Supreme Court.

ARGUMENT

I. THE USE OF A PER SE ERROR RULE UNDER THE FACTS OF THIS CASE IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

Long ago this Court held that an in limine prohibition of cross-examination with respect to relevant evidence itself constituted prejudice and required reversal. Alford v. U.S., 282 U.S. 687, 694 (1931). The Delaware Supreme Court has done no more than that in ruling that " . . . a blanket prohibition against exploring potential bias through cross-examination . . . " constitutes per see error.[17] Van Arsdall v. State, supra, 7. Since Alford, this Court has consistently held that confrontation of witnesses through cross-examination is a fundamental right, the denial of which requires reversal. Davis v. Alaska, 415 U.S. 308 (1973); Smith v. Illinois, 390 U.S. 129 (1968); Brookhart v. Janis, 384 U.S. 1 (1965); Pointer v. Texas, 380 U.S. 400, 405 (1965); Greene v. McElroy, 360 U.S. 474 (1959); and District of Columbia v. Clawans, 300 U.S. 617, 632 (1937). Indeed, the right is so fundamental it has been analogized

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17 The State argues that the Delaware rule always requires automatic reversal and will never permit harmless error analysis of confrontation clause errors. Petition page 11, note 18. In fact, the Delaware Supreme Court has explicitly stated that improperly terminated cross-examination can be harmless. Wintjen v. State, supra, 782. See Beynum v. U.S., 480 A.2d 698, 707 (D.C. App. 1984), where the court applied a test identical to the Delaware rule. There the D. C. Court, finding that there was no in limine prohibition on bias cross-examination and sufficient cross-examination allowed from which the jury could infer bias, applied a harmless error test. The same kind of analysis would be permissible under the Delaware rule. Van Arsdall v. State, supra, 6-7.

to the effective assistance of counsel[18] Pointer v. Texas, supra, 403 [citing Gideon v. Wainwright, 372 U.S. 335 (1963)].

In Davis v. Alaska, supra, this Court held that denial of "the right of effective cross-examination" was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id., 318 (quoting Brookhart v. Janis, supra.). While not all confrontation clause violations may require evaluation under a per se error standard, it is clear that where the witness whose bias defendant sought to elicit provided a "link in the proof" against the defendant this court will utilize a per se error test. Davis v. Alaska, supra, 317.

If a witness' testimony is relevant to prove the existence of any fact tending to establish the defendant's guilt, the defendant must, as a matter of right, be afforded the opportunity to reveal the witness' bias to the jury.[19] In noting that "some topics will be of marginal relevance, and that the trial court may [then] properly prohibit cross-examination " [Van Arsdall v. State, supra, 6], the Delaware Supreme Court recognizes that if the testimony offered against the defendant was merely probative of some collateral issue or was not relevant to prove some element of the offense charged, cross-examination could properly be

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18 Can it be said that there is any relevant distinction between the right to effective assistance of counsel and the right to effective cross-examination? They are theoretically and practically co-extensive concepts in the law. It does the defendant little good to have a court-appointed attorney who is not permitted at trial to ask a prosecution witness about any deal he made with the prosecutor in exchange for his testimony.

19 This is of paramount importance in a case built entirely on circumstantial evidence. The relevant testimony of each prosecution witness in such a case is a link in the chain of evidence tending to prove the defendant's guilt. Van Arsdall v. State, supra, 5 ("The State relied on the circumstantial evidence outlined above.").

prohibited, presumably because the defendant's confrontation right would not have been violated in the first instance.

In finding the issue of bias to have been an "important issue before the court" [Van Arsdall v. State, supra, 7], the Delaware Supreme Court had already concluded that Fleetwood's testimony provided a "link in the chain" of evidence against Van Arsdall,[20] thus requiring the trial court to permit "inquiry into any acts, relationships, or motives reasonably likely to create bias." Van Arsdall v. State, supra, 6 (quoting Weber v. State, supra, 682).[21] Having found the testimony of the witness relevant (and, therefore, necessarily prejudicial), and that the defendant was prohibited from inquiring into the witness' bias, the Delaware Supreme Court simply declines to inquire into the relative extent of the prejudice and instead applies a per se error test. Van Arsdall v. State, supra, 7. Thus, the decision of the Delaware Supreme Court in ruling that an in limine prohibition of cross-examination on bias constitutes

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20 As must necessarily here be the case. In addition to placing Van Arsdall on the scene prior to the murder, the use to which the State put Fleetwood's testimony on cross-examination of Van Arsdall cut to the very heart of the defense.

21 The question also arises, as a matter of public policy, whether the State should be permitted to conceal from the jury a deal it has made in exchange for a witness' testimony by characterizing that testimony as "unimportant". Petition for Writ of Certiorari, page 8.

error per se is consistent with Davis.[22] Further, the Delaware rule is a practical one designed to assist trial courts in grappling with this issue during the heat of trial.[23]

A trial court is, thus, forewarned that some cross-examination on the issue of bias is constitutionally required and only after this threshold level has been met, does the trial court regain its broad discretion to limit the extent of cross-examination. Van Arsdall v. State, supra, 6; and Weber v. State, supra, 682.[24]

In fact, many of the lower court cases relied upon by the State reveal that even where a harmless error test was applied the trier of fact heard some testimony at trial from

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22 In fact, the situation in Van Arsdall where no bias cross-examination was permitted was worse than Davis v. Alaska, supra, where some bias cross-examination was allowed, or Smith v. Illinois, supra, where there was no complete denial of cross-examination.

23 The history of the development of the Delaware rule may in fact indicate that it was designed under the Delaware Supreme Court's supervisory authority to assist its trial courts. There have only been three cases in Delaware treating this issue. In Wintjen v. State, supra, 782, the court held that while some "improperly terminated cross-examination may be harmless error," it was reversible error for the trial court not to allow cross-examination on the issue of bias. In Weber v. State, supra, 682, while agreeing that under some circumstances a trial court may properly prohibit or limit cross-examination, the court set out a two-prong test requiring that some bias cross-examination be permitted sufficient for the jury to draw inferences as to the witness' reliability and from which counsel could argue bias. Finally, in Van Arsdall the Delaware Supreme Court made it crystal clear that some cross-examination on the issue of bias is constitutionally required and that the prohibition thereof will require reversal without regard to the "prejudicial impact" of the error. Van Arsdall v. State, supra, 7.

24 This Court has only recently reiterated that the rule in Davis v. Alaska, supra, requires some cross-examination be permitted to show bias and that no specific showing of prejudice is required if the defendant is thereby denied effective cross-examination. U.S. v. Cronic, ___ U.S. ___, 80 L. Ed.2d 657, 104 S. Ct. 2039 (1984); and U. S. v. Abel, 469 U.S. ___, 83 L. Ed.2d 450, 105 S. Ct. 465 (1984).

which it could infer the witness' bias.[25] Indeed, some of these cases explicitly state the rule that a trial court's discretionary authority to limit cross-examination only comes into play after the defendant has been permitted as a matter of right sufficient cross-examination to satisfy the confrontation requirement.[26]

The other lower court cases upon which the State relies in this Petition are factually different from this case in that they were not built entirely on circumstantial evidence and there was other "overwhelming" evidence against the defendant, mostly in the form of eyewitness testimony.[27] These cases, which Respondent believes, misapply Davis v. Alaska, supra, lead the State, by analogy, to the U. S. Supreme Court precedents cited to this Court by the State, which are inapposite to this case.

The State relies primarily on the application of Chapman v. California, 386 U.S. 18 (1967), to Bruton v. U.S., 391 U.S. 123 (1968), through Harrington v. California, 395 U.S. 250 (1969).[28] The State's argument is basically

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25 State v. Parillo, 480 A.2d 1349, 1358-59 (R.I. 1984); U.S. v. Gambler, 662 F.2d 834, 840 (D.C. Cir. 1981); Kines v. Butterworth, 669 F.2d 6, 13-14 (1st Cir. 1981), cert. cism'd., 421 U.S. 1006; Commonwealth v. Wilson, 407 N.E.2d 1229, 1246 (Mass. 1980); State v. Pierce, 414 N.E.2d 1038, 1043 (Ohio 1980); State v. Patterson, 656 P.2d 438, 440 (Utah 1982); Hoover v. State of Maryland, 714 F.2d 301, 305 (4th Cir. 1983); and Carrillo v. Perkins, 723 F.2d 1165, 1168, 1172 (5th Cir. 1984). Even in U. S. v. Duhart, 511 F.2d 7, 9 (6th Cir. 1975), cert. den., 456 U.S. 980 (1982) the defendant was otherwise able to cast doubt on the witness' testimony and otherwise impeach it.

26 State v. Parillo, supra; Ransey v. State, 680 P.2d 596, 597 (Nev. 1984); and Carrillo v. Perkins, supra.

27 U. S. ex rel Scarpelli v. George, 687 F.2d 1021 (7th Cir. 1982); Ransey v. State, supra; U.S. Duhart, supra; and People v. Boyce, 366 N.E.2d 914 (Ill. App. 1977).

28 Chapman, of course, was available to this Court when it decided Davis v. Alaska, supra, in 1974. If this Court wanted to apply a harmless error standard to the Davis case it could certainly have done so.

that since this Court applied Chapman to Harrington, where the witness was "totally immune from cross-examination,"[29] it should equally apply when the defendant has been prohibited from eliciting bias through cross-examination. The State overlooks two very important distinctions between Harrington and Davis. The first is factual.

Harrington was not a case built on circumstantial evidence. In fact, the Court found that the non-tainted evidence was overwhelming. Harrington v. California, supra, 254. There the defendant himself gave a statement, short of a confession, placing him with the other defendants in flight after the shooting. In each of the other cases upon which the State relies in this Petition the jury had before it, in addition to the tainted evidence, the voluntary confession of the defendant. Parker v. Randolph, 442 U.S. 62 (1979); Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Brown v. U.S. 411 U.S. 223 (1971). In Motes v. U.S., 178 U.S. 458 (1899), the defendant confessed at trial on the witness stand. In Parker the Court pointedly noted that the right of cross-examination "has far less practical value to the defendant who has confessed to the crime than to one who has consistently maintained his innocence." Parker v. Randolph, supra, 73.

In a case where the State has presented overwhelming independent evidence against the defendant and where the defendant has confessed, if this Court can conclude that there was no "reasonable possibility that the improperly admitted evidence contributed to the conviction" [Schneble v. Florida, supra, 432], the Court will not, under a harmless error standard, find reversal required. Thus, this

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29 Petition for Writ of Certiorari, page 16.

Court is loathe to conclude, even in the face of a Confrontation Clause challenge, that a confessing defendant could have been seriously prejudiced by his inability to cross-examine a confessing co-defendant. Yet, even in such a case if this Court could conclude that the case against the defendant would have been "significantly less persuasive had the testimony as to [the co-defendant's] admission been excluded" [Schneble v. Florida, supra, 432], the Court would reverse. However, this fact pattern did not appear in Davis v. Alaska, supra, nor does it appear here. The State's case here was wholly circumstantial and Van Arsdall who consistently maintained his innocence does not base his case upon the improper admission of any evidence.

The second distinction between Harrington and Davis involves the circumstances under which an appellate court may substitute its judgment for that of the jury. In Harrington and its' progeny, this Court has tried to judge the "probable impact" of improperly admitted testimony on the minds of the jury. Additionally, in those cases the witness' immunity from testimony, and, thus, cross-examination, was unavoidable for the trial court since the witness had asserted his right not to testify. Therefore, the jury could never under any circumstances have heard cross-examination on the issue of the non-testifying witness' bias.

In Davis, as here, the Court is dealing with the improper exclusion of evidence of bias of a testifying witness, which, but for the trial court's error, would have been heard by the jury who could have assigned it whatever weight they believed appropriate. In Davis, as here, the witness did not assert any right not to submit to cross-examination. Had the testimony been admitted, this issue would never have arisen on an appellate level. Here the

Court is being asked to speculate on the weight the trier of fact may have assigned to the evidence of the witness' bias had the jury been permitted to hear it. This Court has previously declined to engage in such speculation by invading the province of the jury, and should do so now. Davis v. Alaska, supra, 317.

II. THIS WRIT OF CERTIORARI MUST BE DENIED BECAUSE EVEN UNDER A HARMLESS ERROR ANALYSIS THE ERROR COMMITTED BY THE STATE TRIAL COURT WAS PREJUDICIAL AND NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Delaware Attorney General argues that the decision of the Delaware Supreme Court must be reversed because a harmless, rather than per se, error rule is applicable. Presumably, if Fleetwood's testimony is only cumulative and this case is remanded to the Delaware Supreme Court with instructions to apply a harmless error standard, the convictions of Van Arsdall will be reinstated.[30]

The Delaware Supreme Court was correct in utilizing a per se error rule for this total in limine prohibition of relevant bias or interest cross-examination of a prosecution witness. Van Arsdall v. State, supra, 7. Furthermore, this Writ of Certiorari must also be denied because even if this Court is to determine that a harmless error rule must be utilized as a matter of federal law for violations of the Confrontation Clause of the Sixth Amendment to the United States Constitution, there will be no different result upon remand in this case. That is, Fleetwood was an important

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[30] See discussion at page 8, note 14 of Petition for Writ of Certiorari.

prosecution witness who placed the accused at the homicide scene immediately prior to the killing. Tr. III-49-53 (Fleetwood).

The statements of co-defendant Pregent also placed Van Arsdall at the Pregent apartment before the Epps murder, but Pregent's statements exonerated Van Arsdall. Thus, the only other witness in a case constructed entirely upon circumstantial evidence to the fact that Van Arsdall was even present at the scene before the homicide was Fleetwood.

The use made by the prosecutor at trial of Fleetwood's testimony was highlighted during the cross-examination of Van Arsdall. Here the prosecutor asked Van Arsdall the highly provocative question whether Van Arsdall had gone across the hall to kill Fleetwood. The suggestion made by the prosecutor was that Van Arsdall intended to kill the only detrimental witness placing him in the Pregent apartment before the homicide. Tr. X-78 (Van Ardsall) This suggested further homicidal intent of Van Arsdall was thwarted when Jane Meinier unexpectedly answered the door at the Fleetwood apartment and Van Arsdall also encountered Mark Mood, a third occupant of the Fleetwood apartment.

In closing argument, defense counsel asserted to the jury that the conduct of Van Arsdall after the homicide was not consistent with that of a murderer. Tr. XI-96 , 109. Van Arsdall entered the Pregent apartment from the back stairs late at night after all of the party guests left, with the exception of Pregent and Doris Epps, the victim. The homicide occurred in Pregent's apartment, and under such circumstances with Pregent not casting any blame upon Van Arsdall, it did not make sense for Van Arsdall not to leave by the same route he entered after witnessing the homicide committed by Pregent. Going across the hall to the

Fleetwood apartment carrying the bloody murder weapon was otherwise inexplicable if Van Arsdall was guilty of the crime.

Defense counsel argued to the jury at trial that it was unexplainable why a murderer would reveal himself under such circumstances. Tr. XI-96, 109. Nevertheless, the prosecution was able to undercut this defense theory by the skillful use of Fleetwood's testimony during cross-examination of the accused. Tr. X-78 (Van Arsdall) That is, the prosecutor's answer to the question why Van Arsdall went across the hall to the Fleetwood apartment carrying the murder weapon was because Van Arsdall intended to kill Fleetwood, a witness to his presence in the Pregent apartment before the homicide. In this sense, the testimony of Fleetwood was significant, and it cannot be said under such circumstances that the conceded error of the trial court[31] in not permitting relevant bias or interest cross-examination of this prosecution witness was harmless beyond a reasonable doubt.

This defense theory of why would a murderer reveal himself is particularly important in light of the other trial testimony of Jane Meinier, who claimed that Robert Fleetwood did not leave his apartment after returning from a second visit to a liquor store at approximately 8:00 or 9:00 p.m. on December 31, 1981. Tr. IV-59 (Meinier). Van Arsdall also did not state that he saw Fleetwood prior to the Epps homicide during his final visit to the Pregent apartment that evening.

Under the facts of this case, even if the requested relief of the State of Delaware is granted, the Delaware Supreme Court will still determine that the total in limine

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31 Page 9, note 16 of Petition for Writ of Certiorari.

prohibition against bias cross-examination of prosecution witness Fleetwood was not harmless error beyond a reasonable doubt. The only purpose to be served by granting certiorari in this instance would be to determine whether or not the rule of limited application adopted by the Delaware Supreme Court is Constitutionally permissible. In this respect, it should be noted that the Delaware Supreme Court readily acknowledges the applicability of a harmless error analysis in most Confrontation Clause cases involving a denial of bias cross-examination. Wintjen v. State, supra, 782; and Weber v. State, supra, 682-83.

The rule adopted by the Delaware Supreme Court is of relatively narrow application. Only when there is a total prohibition of relevant bias or interest cross-examination of a prosecution witness is a per se error rule to be applied. Van Arsdall v. State, supra, 6-7. If defense counsel is permitted some cross-examination on the issue of bias or interest of a witness sufficient to argue the issue to the jury, a harmless error rule is to be employed. See Chapman v. California, 386 U.S. 18 (1966).

III. THIS PETITION SHOULD NOT BE HELD PENDING A DECISION IN U.S. V. BAGLEY, NO. 84-48.

This Petition is distinguishable in several ways from U.S. v. Bagley, cert. granted, ____ U. S. ____, 105 S. Ct. 427 (1984). The Solicitor General in Bagley points out that the reliance by the Court of Appeals on Davis v. Alaska, 415 U.S. 308 (1974) was misplaced in that Davis involved a

restriction on cross-examination.[32] In Bagley the defendant was not restricted by the trial court from questioning witnesses. Therefore, the Solicitor General argues that Bagley should be decided on the issue of the "materiality" of the evidence withheld and not under the confrontation clause.

Factually there is even some question whether in Bagley payments by a government agency to commissioned state law enforcement officers for investigative services would have been relevant to prove bias. The witnesses were apparently reimbursed for out-of-pocket expenses incurred during their investigative services and, except for nominal witness fees, were not paid for their testimony.[33] Finally, unlike Van Arsdall, Bagley involves a unique situation where the trier of fact, the trial judge, was able to state beyond a reasonable doubt that had any testimony about payment of expenses been elicited at trial it would have been of no consequence to the outcome. As has been previously stated, in Van Arsdall, the State is asking this Court to announce a rule whereby a reviewing court would have to speculate upon the possible impact on a jury of improperly excluded bias evidence. There is, of course, no such requirement necessary to this Court's consideration of Bagley.

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32 The Solicitor General argues the this case should be decided under the principles laid down by this Court in U.S. v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); and Kotteakos v. U.S., 328 U.S. 750 (1946), all cases involving the due process clause.

33 Also in Bagley the prosecutor was unaware the material evidencing the payments existed. Here the prosecutor was well aware of the deal he had made with Fleetwood.

CONCLUSION

On the basis of the various reasons and authorities cited herein, this Court must deny this Petition for Certiorari. Even under federal law the type and extent of the per se error rule for Confrontation Clause violations fashioned by the State Court is proper. Furthermore, even utilizing a harmless error rule will not result in a different disposition of this case after remand to the Delaware Supreme Court. Finally, it is unnecessary to hold this Petition for Certiorari pending any decision in U.S. v. Bagley, No. 84-48, inasmuch as that is a case involving a denial of Brady material and is factually inapplicable to the Constitutional Confrontation Clause issue present here.

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